No. 78-326

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FOR AND ON BEHALF OF ITS MEMBER, BOISE CASCADE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board
Washington, D.C. 20570

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-326

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, FOR AND ON BEHALF OF ITS MEMBER, BOISE CASCADE CORPORATION, PETITIONER[1]

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 574 F.2d 457. The decision and order of the National Labor Relations Board (Pet. App. 14a-103a) are reported at 217 N.L.R.B. 902.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1978. The order of the court of appeals (Pet. App. 1a) denying rehearing was entered on May 4, 1978. On July

[1]Petitioner was a charging party before the Board and a party in the court of appeals (Pet. App. 3a, 26a).

28, 1978, Mr. Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including August 25, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a work preservation clause in a collective bargaining agreement, lawful at the outset, becomes an unlawful secondary agreement under Section 8(e) of the National Labor Relations Act if the union engages in secondary activity that violates Section 8(b)(4)(B) of the Act.

2. Whether substantial evidence supports the Board's finding that the Building Trades Council did not assist the Union in violating Section 8(b)(4)(B) of the Act.

3. Whether the Board was reasonable in rejecting petitioner's request for extraordinary remedies for the Union's violations of Section 8(b)(4)(B) of the Act.

STATEMENT

1. For many years the Union[2] and some 50 contractors[3] in the Butte, Montana, area who employ carpenters have had a collective bargaining relationship (Pet. App. 34a). During the 1971 contract negotiations, the Union proposed a work preservation clause for the purpose of protecting the jobs of its members against the diminution that they expected to occur if fully prebuilt houses were

[2]United Brotherhood of Carpenters and Joiners of America, Local Union No. 112, AFL-CIO.

[3]The contractors bargained through the Butte Contractors Association and the Silver Bow Employers Association (Pet. App. 36a n.1).

brought into the Butte area. The contractors resisted the clause and a strike ensued, which lasted for 90 days. The contractors and Union ultimately reached an agreement (Pet. App. 36a-37a). Article XXII of the new collective bargaining agreement permitted carpenters to work on prefabricated houses delivered to a jobsite with either the "exterior siding or finishing" or "all wallboards and/or paneling" left off.[4] It required the house to be delivered with either "all exterior trim" or "all interior trim" left off. Article XXII also provided that the installation of all interior doors, the shingling of all roofs, the installation of all cabinets and shelving, and certain other work, including "the placing and fastening of all components of the structure upon the foundation," must be performed by jobsite carpenters (Pet. App. 39a-40a).

In an earlier case, *United Brotherhood of Carpenters, Local No. 112 (Silver Bow Employers' Association)*, 200 N.L.R.B. 205 (1972), the Board found that the purpose of Article XXII was "solely to preserve work traditionally performed by [Union] members and that [its] effect upon the use by contractor-members of modular homes, whether union-built or otherwise, was purely incidental" to that primary objective (*id.* at 209). Accordingly, the Board dismissed a complaint alleging that the clause violated Section 8(e) of the Act, 29 U.S.C. 158(e).

The present case arises out of the Union's efforts to enforce Article XXII. The evidence showed that Union representative Cadigan ordered employees of three contractors who were signatories to the agreement containing Article XXII to cease working on modular or prefabricated homes manufactured by Summit Valley or

[4]The text of Article XXII is set forth at Pet. App. 37a-38a.

Boise Cascade; these homes arrived at the jobsite more fully finished than the specifications of that clause permitted. In each of these instances, the contractors had been hired to install particular houses and did not have the right to control the specifications (Pet. App. 44a-47a).

Cadigan also attempted to force Reed Lemmons (a house-mover under contract with Boise Cascade) and Jack McLeod (a franchise dealer for Boise Cascade) to cease working on or dealing in Boise Cascade homes because they did not comply with Article XXII, and to compel McLeod to sign the Union's contract (Pet. App. 47a-49a). Cadigan induced two of Boise Cascade's own employees not to work on installation of a Boise Cascade house in Butte because Boise Cascade was not a signatory to the Union's contract (Pet. App. 49a-50a).

When Summit Valley, on request from one of its customers, sought to install its houses itself, using its own employees—who were represented by a Teamsters local union, and whose contract provided for installation work—the Union picketed a Summit Valley model home with signs stating that carpenters had not been employed in constructing the building (Pet. App. 50a-52a).[5]

2. The Board concluded that the Union violated Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), by inducing the employees of the three contractors who were signatories

[5]Summit Valley filed charges alleging that the Union was violating Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D), by attempting to force Summit Valley to reassign modular home work from the Teamsters to the Union. The Board determined the jurisdictional dispute in favor of the Teamsters. *United Brotherhood of Carpenters, etc. (Summit Valley Industries, Inc.)*, 202 N.L.R.B. 974 (1973). The Union, although assuring the Board that it would not require Summit Valley to assign work in violation of its Teamsters contract, reserved the right "to truthfully advise the public, whether by picketing or other publicity, that the Summit Valley Industries, Inc., does not employ members of, or have a contract with the [Union]" (Pet. App. 50a-52a).

to the Union's contract to cease working on the modular homes, and by exerting pressure against Lemmons, McLeod, Boise Cascade, and Summit Valley to cease bringing those homes into the Butte area. Even assuming that the Union had a work preservation object, the Board found, it also had a secondary object forbidden by Section 8(b)(4)(B) because the three contractors did not have the right to control the work in question, and the other persons never had a contract or collective bargaining relationship with the Union covering their employees (Pet. App. 66a-69a). The Board also concluded that the Union violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D), by failing unequivocally to discontinue picketing designed to achieve a reassignment of the work assigned to Summit's Teamsters-represented employees (Pet. App. 94a-97a).

The Board dismissed the complaint insofar as it alleged that Article XXII of the Union's contract and its maintenance violated Sections 8(e) and 8(b)(4)(A) of the Act (Pet. App. 84a).[6] The Board concluded that Article XXII, which it previously had found to be a lawful work preservation clause, was not transformed into an unlawful secondary agreement merely because the Union had sought to enforce the clause in situations where it had no legal right to do so (Pet. App. 80a). The Board, crediting the testimony of Union representative Cadigan, found that the Union did not have any "concern with the organizational status" of Boise Cascade or Summit Valley, and that the Union's "general approach to Article XXII [evidenced] a single-minded effort to further a sincerely held conviction that the advent of modular

[6]Member Kennedy dissented from this dismissal (Pet. App. 16a-23a).

houses threatened employment opportunities of [its] carpenters" (Pet. App. 80a-81a).[7]

Finally, the Board concluded that the Southwestern Building Trades Council of Montana, of which the Union was a member, did not assist the Union in its violations of Section 8(b)(4)(B) of the Act. The Board found that a letter sent by the Council—the sole evidence presented to prove the Council's complicity—was sent only to four employers not involved in the "modular housing dispute" (Pet. App. 87a-88a, 93a-94a).

The Board ordered the Union to cease and desist from the unfair labor practices found, to rescind any fines or other discipline that had been imposed on Union members in furtherance of the Union's unlawful secondary activity, and to post and prepare for mailing appropriate notices of compliance (Pet. App. 100a-102a). The Board declined petitioner's request for additional remedies (Pet. App. 97a-98a).

The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. 2a-13a).

ARGUMENT

1. A. In *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612 (1967), Frouge, a general contractor, was party to a collective bargaining agreement with the union which provided that its employees would not be required to handle doors that had been finished off the jobsite. The employees struck when Frouge nevertheless ordered such doors, which it was not required to do by its contract with the project

[7]The Board observed that, at the time the Union sought to enforce Article XXII against contractors who did not have the "right to control" the disputed work, the legitimacy of its action was supported by several decisions of the courts of appeals (Pet. App. 81a n. 12, 98a).

owner. This Court concluded that determination whether the "will not handle" clause of the collective agreement, and its enforcement, were unlawful "cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's object was preservation of work for Frouge's employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644). Applying this test, the Court held that the objective of the "will not handle" clause "was preservation of work traditionally performed by the jobsite carpenters," making the clause itself a lawful work preservation agreement.

In *NLRB* v. *Enterprise Association*, 429 U.S. 507 (1977), the union entered into a work preservation clause that was valid under *National Woodwork*. It then brought pressure to bear against Hudik, a contractor-signatory to the clause who, unlike Frouge, did not have the right to control the work sought by the union. Rejecting the union's contention that its pressure against Hudik was authorized by the work preservation clause, the Court stated: "Even though a work preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by §8(b)(4)(B)" (429 U.S. at 521 n.8).

National Woodwork and *Enterprise* together demonstrate that the lawfulness of a work preservation clause depends on "whether, under all the surrounding circumstances, the Union's object was preservation of work" for the employees covered by the agreement (386 U.S. at 644), but that lawful clauses may not be enforced with a secondary objective. Unlawful enforcement of a lawful clause, however, does not render the clause itself unlawful. The Board properly applied those principles here.

Given the evidence before it in *Silver Bow, supra*, 200 N.L.R.B. at 206-210, the Board was warranted in finding that Article XXII, when negotiated, was intended merely to preserve the work historically and traditionally done by employees of the Butte contractors. Moreover, substantial evidence supports the Board's finding that the Union's subsequent violations of Section 8(b)(4)(B) did not negate the work preservation objective that Article XXII was intended to serve and still serves when properly enforced (see Pet. App. 74a-76a, 80a-81a).

B. Petitioner is wrong in contending (Pet. 20-21) that the court of appeals rejected the "foreseeable consequences" test of *NLRB* v. *Local 825, Operating Engineers (Burns and Roe, Inc.)*, 400 U.S. 297 (1971), by stating that "[b]ecause the union miscalculates the circumstances under which it can act to enforce the clause, it does not render the clause invalid" (Pet. App. 9a). *Burns and Roe* merely holds that where the union engages in "flagrant secondary conduct" (*id.* at 305), it is charged with foreseeing that its conduct would sufficiently disrupt business relationships to be unlawful under Section 8(b)(4)(B). That decision has no bearing on the different question presented here—whether an otherwise lawful work preservation clause is converted into a secondary agreement because the union mistakenly has applied it in an unlawful manner.[8] The fact that, under

[8]Nor did the court of appeals fail to follow the "all the surrounding circumstances" test enunciated in *National Woodwork* in holding that the Board did not err in refusing to admit into evidence studies on the economic conditions of the modular housing industry (Pet. 24-26). The administrative law judge, whose findings were adopted by the Board, received extensive evidence from experts and others with regard to the Butte area but excluded evidence relating to the national construction industry on the ground that "studies relating to prefabricated houses and restrictive union practices generally, were

some circumstances, "the express terms and the application of Article XXII" may have precluded "the introduction of modular housing in the Butte area" (Pet. 21), does not establish that the clause violated Section 8(e). "Some disruption of business relationships is the necessary consequence of the purest form of primary activity." *Burns and Roe, supra*, 400 U.S. at 304.

C. Petitioner's reliance (Pet. 9-12) on *Connell Construction Company* v. *Plumbers Local 100*, 421 U.S. 616 (1975), is unwarranted. In *Connell* the union entered into an agreement with Connell—a general contractor—which required Connell to subcontract plumbing work only to employers who were signatories to the union's collective bargaining agreement. The union did not represent any of Connell's employees, and therefore the agreement could not be justified as a lawful work preservation agreement; the agreement was clearly secondary, and the only question was whether the "construction industry proviso" to Section 8(e) created some defense to antitrust liability.[9] The Court held that the agreement did not serve the purpose of the proviso—the avoidance of friction between union and non-union workers on the same job-site—because it was not limited to jobsites on which Local 100's members were working. Moreover, to sanction the agreement would permit "top-down" organizing—a result contrary to the entire thrust of the 1959 amendments to

not sufficiently closely related to the particular issues in this proceeding * * *." (Pet. App. 72a; see also *id.* at 77a-80a). This was an allowable judgment. Cf. Fed. R. Evid. 401 and 403.

[9]The proviso exempts from the prohibition of Section 8(e) "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure or other work."

the Act, of which Section 8(e) was a part—because Local 100 did not represent or seek to represent Connell's employees (421 U.S. at 631-633). These considerations do not apply to Article XXII of the agreement involved here, for the Union entered into an agreement with employers whose employees it represented, and the purpose of Article XXII was to protect the work opportunities of the employees whom it represented. To be sure, in some instances, the Union applied the agreement in an unlawful secondary manner, but that does not sap Article XX11 of an possible lawful applications.

2. Petitioner contends (Pet. 26-28) that, even if the work preservation clause is valid under *National Woodwork*, this case presents a "timely opportunity to reconsider the work preservation doctrine in light of the abuses portrayed in this case." Petitioner argues that the work preservation clause threatens a "total exclusion from [the] market" (Pet 27) of prefabricated housing. That contention is unfounded. It ignores the fact—vividly shown by the record of this case—that purchasers of prefabricated homes often order them in finished form (Pet. App. 32a, 47a). In such circumstances, the Board's order makes clear that the work preservation clause may not be enforced by the Union to restrict the freedom of choice of the purchaser (Pet. App. 84a):

> Nothing [in this order] is to be construed as making Article XXII enforceable for all purposes. It is enforceable only in situations which parallel that in *National Woodwork* where the contracting employer has full control of the work assignment. In all other situations where the contracting employer is powerless to award the work, or the pressure is directed at a noncontracting employer or his employees, Carpenters may not press for Article XXII work * * *.

Thus, the Union may not enforce the clause to prevent erection of prefabricated houses where purchasers, rather than contractors, make the decision to order such houses in finished form (see Pet. App. 66a-69a).

3. Petitioner's contention (Pet. 21-22) that the Board erred in failing to find that the Council assisted the Union in its unlawful Section 8(b)(4)(B) activity, and therefore also violated that Section, raises only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23. In any event, the record supports the Board's conclusion that the only evidence presented to support the alleged Council violation—a letter sent to four contractors not involved in the modular-housing dispute—failed to show that the Council had any connection with the illegal secondary activities. See page 6, *supra*.

4. Petitioner's final contention (Pet. 22-24)—that the court of appeals should not have sustained the Board's decision not to grant extraordinary remedies in light of the Board's asserted failure to explain its rejection of those remedies—likewise presents no issue warranting review by this Court. There is no factual foundation for petitioner's argument. The Board not only explicitly acknowledged petitioner's request but also explained in

detail its reasons for denying it (Pet. App. 97a-98a).[10] The selection of remedies under the Act is "a broad discretionary one * * * for the Board to wield, not for the courts" because "the relation of remedy to policy is peculiarly a matter for administrative competence." *NLRB* v. *Seven-Up Co.*, 344 U.S. 344, 346, 349 (1953). See also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969). For the reasons detailed in note 10, *supra*, and because petitioner's request for additional remedies was premised in part on alleged violations of the Act that were not found by the Board, the Board acted within its discretion in selecting customary remedies for the violations that it found.

---

[10]The Board rejected petitioner's request for "widespread dissemination of the notice by having it read to members, mailed to contractors bound by Article XXII, and published in a local newspaper" (Pet. App. 97a). The Board explained that the normal posting of notices "in conspicuous places at [the Union's] business offices, meeting halls, and all other places where notices to members are customarily posted" (*id.* at 101a) was sufficient because (*id.* at 98a):

> The members will be sufficiently apprised of the holding thereby, and there is no reason to believe that they, or the local, will not abide by the requirements of the order.* * * [The Union] has been enjoined from enforcement of Article XXII by court order since November 1972. It does not appear that the injunction had unusual dissemination, and it has not been shown that [the Union] or their members have not complied therewith, or that Summit Valley or Boise Cascade have been confronted with difficulties in marketing their houses in the Butte area during this period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board

November
~~OCTOBER~~ 1978